A

Public Prosecutor v Thayalan a/l Maniam

B HIGH COURT (SHAH ALAM) — CRIMINAL REVIEW NO 43–2 OF 2007
KN SEGARA J
16 FEBRUARY 2007

C *Criminal Procedure — Charge — Framing or particulars of — Charge failed to follow wording of s 41A(1) of the Dangerous Drugs Act 1952 — Whether charge baseless and not legally sustainable*

D The accused was charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'), an offence triable exclusively by the High Court. The notes of proceedings showed that the magistrate had acted correctly when the charge was read and explained to the accused as required under s 41A(1) of the DDA. No plea was taken from the accused after the charge was explained to him, as the magistrate had no jurisdiction to try the said offence. This was in complete contravention of s 41A(1) DDA as the magistrate did not transmit the case to the High Court and thereafter, the accused was remanded for two months to enable the DPP to obtain E a chemist report after the charge had been framed. Issue was whether the DPP had framed a baseless charge and if so, whether the magistrate was correct not to transmit the case to the High Court.

F **Held:**

(1) Upon a perusal of the record of proceedings of the magistrate, it was patently clear that the DPP had framed a baseless charge on 29 January 2007 when he was not in a position to determine an appropriate charge because investigations were incomplete by reason of the absence of a chemist report. In such an G unequivocal situation, the magistrate should not transmit the case to the High Court under s 41A(1) DDA but instead release the accused under s 29 CPC (see para 20).

(2) A magistrate should not appear to act in collusion with the DPP when making any order for remanding an accused person. The appearance of a senior DPP H before a magistrate should not intimidate the magistrate. The order of the learned magistrate Petaling Jaya in Kes Jenayah No M3–81–2–2007 made on 29 January 2007 was set aside. The magistrate was directed to cause the accused to be produced before her forthwith and be released under s 29 CPC as the charge under s 39B(1)(a) was baseless and cannot be remitted to the High Court for trial under s 41A(1) DDA (see para 21 & 22).

I

[Bahasa Malaysia summary

Tertuduh telah dituduh di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'), satu kesalahan yang dibicarakan secara eksklusif oleh Mahkamah Tinggi. Nota-nota

prosiding menunjukkan bahawa majistret telah bertindak betul apabila memastikan pertuduhan dibacakan dan diterangkan kepada tertuduh seperti yang diperlukan oleh s 41A(1) ADB. Tidak ada pli diambil daripada tertuduh selepas pertuduhan diterangkan kepadanya kerana majistret tidak mempunyai bidangkuasa untuk membicarakan kesalahan tersebut. Ini bertentangan dengan s 41A(1) DDA dan selepas itu, tertuduh direman untuk dua bulan. Isu untuk dibicarakan oleh mahkamah adalah sama ada Timbalan Pendakwa Raya telah menbentuk satu pertuduhan yang tidak berguna dan jika begitu sama ada majistret adalah betul dalam menukar kes ke Mahkamah Tinggi.

Diputuskan:

(1) Berdasarkan nota-nota prosiding majistret, adalah jelas bahawa DPP telah membentuk pertuduhan pada 29 Januari 2007 apabila beliau tidak berada dalam keadaan untuk memastikan pertuduhan yang betul kerana siasatan adalah tidak lengkap disebabkan ketiadaan repot ahli kimia. Dalam keadaan tak kesamarataan, majistret tidak harus menukar kes ke Mahkamah Tinggi di bawah s 41A(1) DDA tetapi perlu melepaskan tertuduh di bawah s 29 Kanun Jenayah. (lihat perenggan 20).

(2) Majistret tidak patut bertindak berpakat secara sulit dengan DPP apabila satu perintah bagi reman dibuat oleh tertuduh. Perintah majistret Petaling Jaya yang bijaksana dalam Kes Jenayah No M3–81–2–2007 yang dibuat pada 29 Januari 2007 telah diketepikan. Tertuduh diarahkan untuk berhadapan dengan majistret dan dilepaskan di bawah s 29 Kanun Jenayah seperti mana pertuduhan di bawah s 39B(1)(a) adalah tidak berguna dan oleh itu, tidak boleh ditukar ke Mahkamah Tinggi bagi perbicaraan di bawah s 41A(1) DDA (lihat perenggan 21–22).]

Notes

For cases on framing or particulars of charge, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1086–1185.

Cases referred to

Perumal v PP [1970] 2 MLJ 265 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 31, 35
Criminal Procedure Code ss 29, 117, 254, 323
Dangerous Drugs Act 1952 ss 39B(1)(a), (3), (4), 41A(1), (2)

Nik Suhaimi bin Nik Sulaiman (Deputy Public Prosecutor) (Attorney General's Chambers) for the prosecution.
Suraj Singh (Suraj Singh & Co) for the defendant.
Rajpal Singh (Selangor Bar Committee) counsel for watching brief.

KN Segara J:

[1] A copy of the record of proceedings in Kes Jenayah No M3–81–2–2007 at the Magistrate's Court Petaling Jaya, together with a copy of the grounds of decision and a letter dated 31 January 2007 by the said magistrate with a request for revision was received by the High Court Shah Alam on 2 February 2007.

[2] This revision fixed before me today is pursuant to the said request by the magistrate, in the exercise of my powers under ss 31 and 35 of the Courts of Judicature Act 1964 as well as s 323 Criminal Procedure Code.

[3] An examination of the record of proceedings, namely the charge sheet (Courts 114), shows that the accused was arrested on 17 January 2007. The accused was produced before the magistrate (for all intents and purposes after the investigations were completed) on 29 January 2007 with a charge framed, signed and dated 29 January 2007 by the DPP Nik Suhaimi bin Nik Sulaiman, as follows:

PENDAKWA RAYA LAWAN THAYALAN A/L MANIAM

PERTUDUHAN

Kamu didakwa atas kehendak Pendakwa Raya dan pertuduhan terhadap kamu adalah:

Bahawa kamu pada 17 Januari 2007 jam lebih kurang 9.30 Malam di dalam Kedai Makanan dan Minuman USJ 2, di dalam Daerah Petaling Jaya, di dalam Negeri Selangor telah memperedarkan dadah berbahaya iaitu heroin seberat 75.4 gram dan dengan itu kamu telah melakukan kesalahan di bawah s 39B (l)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah s 39B (2) Akta yang sama.

Bertarikh pada 29 Januari 2007

Dengan kuasa yang diberi oleh Pendakwa Raya,

t.t.

...

(NIK SUHAIMI BIN NIK SULAIMAN)

Timbalan Pendakwa Raya

Selangor.

[4] The charge under s 39B(1)(a) Dangerous Drugs Act 1952 ('DDA') is triable exclusively by the High Court.

[5] The notes of proceedings for 29 January 2007 before the magistrate shows that the magistrate acted correctly when she had the charge read and explained to the accused as required by s 41A(1) DDA. Very correctly, too, no plea was taken from the accused after the charge was explained to him, as the magistrate has no jurisdiction to try the said offence. Unfortunately, what followed, thereafter, is in complete contravention of s 41A(1) DDA, in that the magistrate did not transmit the case to the High Court, and instead remanded the accused for two months, until 29 March 2007.

[6] There is no provision in the DDA that enables the magistrate to remand an accused, charged with an offence under s 39B(1)(a) DDA for two months, for the purpose of enabling the DPP to obtain a chemist report after the said charge has been framed, read and explained to the accused on his first appearance before the magistrate (after the expiry of his period in custody for investigations on the suspected trafficking charge for which he had been arrested and remanded, in the first instance). A magistrate can only remand an accused (for a maximum of 15 days and not two months) in proceedings under s 31B DDA or s 117 CPC on grounds investigations cannot be completed, pending a chemist report as to the nature of the substance in the alleged possession of the suspect.

[7] It is unlawful and unconscionable conduct for a DPP to frame a charge under s 39B(1)(a) DDA without first studying a chemist report to ascertain the nature of the substance in the possession of the accused. Prosecutors are to prosecute and not persecute!

[8] Section 41A(1) DDA does not mandate any consent of the Public Prosecutor to be produced before the magistrate as a condition precedent for the magistrate to transmit the case to the High Court. All that the magistrate has to do is satisfy himself that the Public Prosecutor has framed a charge against the accused for an offence under the DDA which is triable exclusively by the High Court and that the same has been read and explained to the accused without his plea taken. Thereafter, the magistrate must transmit the case to the High Court and cause the accused to appear before the High Court in order for the High Court to fix a date for his trial.

[9] It is only in very rare and exceptional circumstances that the Public Prosecutor may require a magistrate to transmit under s 41A(1) DDA an offence which is not triable exclusively by the High Court (consistent with s 41(2) DDA). It is only in such rare instance that the (written) requisition of the Public Prosecutor relating to the offence that is not triable exclusively by the High Court must be produced to the magistrate before he transmits such a case to the High Court.

[10] A failure by the magistrate to transmit a case, which has met all the prerequisites (discussed above) under s.41A(l) DDA, to the High Court is irregular and incorrect in law.

[11] For ease of comprehension, the notes of proceedings before the magistrate, as well as her grounds of decision, is reproduced below:

NOTA KETERANGAN	
Koram :	Pn Maimoonah bte Aid
Tarikh :	29 January 2007
Timbalan Pendakwaraya :	Nik Suhaimi bin Nik Sulaiman
Peguambela :	En Suraj Singh bagi OKT
OKT :	Pertuduhan dibacakan, diterangkan dan fahami.

DPP :	Puan, kehadiran saya bukan tujuan untuk kes dipindahkan ke Mahkamah Tinggi di bawah s 41B Akta Dadah Berbahaya 1952. Oleh yang demikian, saya pohon pertuduhan dibacakan.
OKT :	Pertuduhan dibacakan, diterangkan dan fahami.
DPP :	Pertuduhan telah dibacakan. Oleh sebab itu pohon tarikh sebutan untuk menunggu izin daripada Pendakwaraya di bawah s 41A Akta Dadah Berbahaya 1952.
Mahkamah :	Kenapa kes ini tidak boleh dipindahkan ke Mahkamah Tinggi immediately?
DPP :	Puan, kehadiran saya hari ini bukan untuk memindahkan kes. Ini adalah kerana di dalam kes ini laporan kimia belum diperolehi dan saya hadir pada hari ini kerana undang-undang di bawah s 39B ADB 1952 membenarkan OKT dituduh dahulu kerana laporan kimia belum diperolehi. Dalam hal ini laporan kimia amat diperlukan dalam menentukan bidangkuasa mahkamah mana yang harus mendengar kes ini.
Mahkamah :	Setelah meneliti hujahan DPP dan mengambil kira kes-kes berikut: *PP v Johar dan tiga orang*, *PP v An Kee Cheng*, *PP v Muhamad*, *PP v Marwan bin Ismail*.
	Mahkamah memutuskan untuk mengikut penghakiman Datuk Zaharah Ibrahim.
	29 March 2007 (Sebutan) izin DPP. OKT direman di Sg Buloh OTP.
	tt. Maimoonah bt Aid

SALINAN DIAKUI SAH

tt.
(MAIMOONAH BT AID) Majistret
Mahkamah Majistret Petaling Jaya
Selangor Darul Ehsan.

ALASAN KEPUTUSAN

Dengan izin Yang Arif,

(1) Orang Yang Kena Tuduh di atas (selepas ini dirujuk sebagai OKT) telah dituduh dibawah s 39B(1)(a) Akta Dadah Berbahaya 1952.

(2) Tiada izin dikemukakan untuk memindahkan kes ini ke Mahkamah Tinggi.

(3) Pihak Timbalan Pendakwaraya yang diwakili oleh Tuan Nik Suhaimi bin Nik Sulaiman telah berhujah inter alia bahawa satu tarikh sebutan adalah diperlukan bagi mendapatkan izin kes ini dipindahkan ke Mahkamah Tinggi memandangkan laporan kimia belum diperolehi. Oleh yang demikian, sehingga laporan kimia diperolehi barulah dapat ditentukan mahkamah mana yang mempunyai bidang kuasa mendengar kes tersebut.

(4) Setelah mendengar hujahan tersebut dan mengambil kira penghakiman-penghakiman di dalam kes-kes berikut:

(i) *Pendakwaraya v Toha & 3 yang lain*;

(ii) *Pendakwaraya v An Kee Cheng*;

(iii) *Pendakwaraya v Muhammad*; dan

(iv) *Pendakwaraya v Marwan bin Ismail*.

Saya telah membuat keputusan untuk menggunapakai penghakiman Datuk Zaharah Ibrahim di dalam kes (ii) di atas.

(5) Namun, saya dengan rendah diri menyerahkan kepada Yang Arif Hakim untuk pertimbangan selanjutnya.

Keputusan pada: 30 January.2007

Peguambela : En Suraj Singh

Timbalan Pendakwaraya: Tuan Nik Suhaimi.

t.t

(MAIMOONAH BT AID)

Majistret

Mahkamah Majistret

Petaling Jaya

Selangor Darul Ehsan.

[12] The learned DPP submitted before the magistrate and I quote:

Puan, kehadiran saya hari ini bukan untuk memindahkan kes ini. Laporan kimia belum diperolehi dan saya hadir pada hari ini kerana undang-undang di bawah s 39B ADB 1952 membenarkan OKT dituduh dahulu kerana laporan kimia belum dipereolehi. Dalam hal ini laporan kimia amat diperlukan dalam menentukan bidang kuasa mahkamah mana yang harus mendengar kes ini.

[13] The submission of the learned DPP is completely flawed because s 39B(3) DDA, which he has alluded to, does not authorise any charge to be preferred first pending the availability of a chemist report. What the proviso to s 39B(3) DDA permits is that a person arrested may be remanded (although not charged) notwithstanding the consent of the Public Prosecutor to the institution of a prosecution has not been obtained. This is clearly intended to cover a situation where all the investigations have been completed (afortiori the chemist report is also in the

hands of the Public Prosecutor) but nevertheless, the Public Prosecutor needs time to apply his mind personally as to whether he should consent to the institution of a prosecution for the offence under s 39B(1)(a) DDA.

[14] Following upon the heels of s 39B(3) DDA, s 39B(4) DDA provides for a situation when the accused is brought before a court charged for an offence under s 39B(1)(a) DDA (for example, before the High Court upon the case being transmitted under s 41A DDA) before the Public Prosecutor has consented to the prosecution, then the charge shall be read to him (in the High Court) but he shall not be called upon to plead and the provisions of the law for the time being in force relating to criminal procedure (in this example, in the High Court) shall be modified accordingly.

[15] At this juncture it is salutary to remember *Perumal v Public Prosecutor* [1970] 2 MLJ 265 where the Federal Court ruled that a prosecution is instituted only when the accused is called upon to plead to the charge.

> But we agree that the proviso to subsection (1) and the new subsection (2) of s 26 of the Act limit the meaning of the phrase 'institution of prosecution' and for the purposes of this section a prosecution is instituted when the accused is called upon to plead to the charge. In other words, irrespective of what happened prior to that stage, there must be a consent of the Public Prosecutor when the accused is called upon to plead. (Emphasis added.)

[16] Magistrates should take note that in respect of an offence under s 39B(1)(a) DDA an accused can only be called upon to plead to the charge at his trial in the High Court.

[17] I cannot over emphasize that at no stage should the DPP be heard to say that the chemist report is not available and yet frame a charge under s 39B(1)(a) DDA.. If the DPP finds himself in such an embarrassing situation in the High Court then he should unhesitatingly seek solace in the provisions of s 254 CPC and inform the court he declines to further prosecute the said charge.

[18] Section 41A(1) DDA should be read independently of s 39B(3)and s 39B(4) DDA.

[19] It is significant to note the word 'court' and not 'subordinate court' is used in s 39B(4) DDA, in the sentence:

> (4) When a person is brought before a court under this section before the Public Prosecutor has consented to the prosecution the charge shall be explained to him but he shall not be called upon to plead,...

which is without doubt a reference to both the High Court as well as the subordinate court, whereas in s 41A(1) DDA the word used is 'subordinate court' in the sentence:

> the accused person shall be produced before the appropriate *subordinate court* which shall, after the charge has been explained to him, transmit the case to the High Court

[20] Upon a perusal of the record of proceedings of the magistrate it is patently clear that the DPP had framed a baseless charge on 29 January 2007, when he was not in a position to determine an appropriate charge, because investigations were incomplete by reason of the absence of a chemist report. In such an unequivocal situation, the magistrate should not transmit the case to the High Court under s 41A(1) DDA but, instead, release the accused under s 29 CPC. It would be unlawful for the magistrate to remand the accused for two months or any other period to enable the DPP to obtain the chemist report, and only thereafter for the DPP to ascertain the 'proper charge' against the accused.

[21] A magistrate should not appear to be acting in collusion with the DPP when making any order for remanding an accused person. The appearance of a senior DPP before a magistrate should not intimidate the magistrate.

[22] In the above circumstances, the order of the learned magistrate, Petaling Jaya in Kes Jenayah No M3–81–2–2007 made on 29 January 2007 remanding the accused till 29 March 2007 is set aside. The magistrate is directed to cause the accused to be produced before her forthwith and released under s 29 CPC because the charge under s 39B(1)(a) is baseless and the case cannot be remitted to the High Court for trial under s 41A(1) DDA.

Order set aside.

Reported by Janani Suntharalingam